APPENDIX A

Rule 4 of the Federal Rules of Appellate Procedure provides in pertinent part:

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or

10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Rule 60 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 60. Relief From Judgment or Order

* * *

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 77 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 77. District Courts and Clerks.

* * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to

relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16103

JACK C. SMITH,

Plaintiff-Appellant,

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge.
(CV-87-06134-JPV)

Argued and Submitted November 3, 1993
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: CANBY and NOONAN, Circuit Judges, and HUFF,** District Judge

Jack Smith brought this wrongful termination action against his former employer, the United States Postal Service. Smith contended that he had been improperly discharged because of his physical handicap, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The district court, adopting the findings and conclusions of law of a magistrate, rendered judgment against him.[1] Approximately five-and-a-half months after judgment was entered, Smith moved the district court to reopen the time for filing a notice of appeal or to vacate and reenter the judgment. The district court denied this motion, and Smith appeals. We affirm.

BACKGROUND

The district court entered judgment on July 19, 1991. Although Smith's local counsel in San Francisco received notice of the entry of judgment, his "lead" counsel in Washington, D.C., failed to receive such notice. Allegedly because the court sent all previous communications to both attorneys, Smith's local counsel failed to inform lead counsel of the entry of judgment. Under Fed. R. App. P. 4(a)(1), Smith had sixty days to file notice of appeal. The district

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** The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

[1] This was the second judgment entered against Smith. We overturned the first judgment because the district court, after rejecting Smith's attempt to file overly-lengthy objections to the magistrate judge's report, had then refused to permit Smith to file a late set of shortened objections. Smith v. Frank, 923 F.2d 139 (9th Cir. 1991).

court had the power to extend this period for a maximum of thirty days. Fed. R. App. P. 4(a)(5). Because Smith failed to file notice of appeal within the original sixty-day period or request an extension of time, his possibility of appeal was extinguished in September 1991.

On December 1, 1991, Rule 4(a)(6) of the Federal Rules of Appellate Procedure became effective. Rule 4(a)(6) gave district courts a much greater period of time in which they may reopen the time for appeal. According to the new provision, if a party failed to receive notice of the judgment and the party files a motion within 180 days of the entry of judgment, the court has discretion to reopen the time for 14 days.

Five-and-a-half months after the entry of judgment, the defendant's attorney called Smith's lead counsel on a related matter and mentioned the judgment. This apparently was the first time Smith's lead counsel had heard about it. One week later, on January 9, 1992, Smith's lead counsel moved the district court to extend the time to appeal under Fed. R. App. P. 4(a)(6) or in the alternative to vacate and reenter the judgment under Fed. R. Civ. P. 60(b)(1) or (6). The motion was filed within the 180-day period permitted by the new rule. The district court denied the motion.

DISCUSSION

I. Reopening the Time for Appeal Under Rule 4(a)(6).

Smith contends that amended Rule 4(a)(6) applies, even though his opportunity for an extension of time to appeal had expired while the prior version of the Rule was still in effect. Smith argues that the new version of the Rule

resurrects his opportunity, because his motion was made within 180 days of judgment, as the amended Rule specifies. He also contends that the district court abused its discretion in denying relief under the amended Rule.

The government, not surprisingly, objects to Smith's attempt to apply the amended Rule "retroactively." We need not decide, however, whether the amended Rule extends to cases such as Smith's, because we conclude that Smith could not obtain relief even if amended Rule 4(a)(6) applies.

For a party to obtain relief under amended Rule 4(a)(6), he first must show that he failed to receive adequate notice. Each party is considered to have notice of all facts of which his attorney is on notice. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962), *citing Smith v. Ayer*, 101 U.S. 320, 326 (1879). Where a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment. *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986).

Smith does not dispute that his local counsel received a copy of the notice of entry of judgment.[2] Under *Link* and

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[2] Smith asserts that he had relied on the court's consistent practice of sending all communications to lead counsel and argues that he received no adequate notice when the court mailed the entry of judgment to his local counsel only. This argument fails under Link and Alaska Limestone. Although the Link rule of constructive notice may seem harsh in some circumstances, it is not harsh here. The local rules of the district court required Smith to designate local counsel "upon whom copies of pleadings may be served and with whom the judge and opposing counsel may communicate concerning the conduct of the action." N. Dist. Cal. L.R. 110-2(a). If the district court was required to communicate with out-of-town counsel to give adequate notice, the

Alaska Limestone, Smith had notice and, thus, the district court was precluded from granting relief under Rule 4(a)(6). Consequently, the district court could not have abused its discretion in denying Rule 4(a)(6) relief.

II. Reentry of Judgment Under Rules 60(b)(1) and (6).

Under Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a party from a final judgment "for the following reasons: (1) mistake, inadvertence, surprise, or *excusable neglect;* . . . or (6) any other reason justifying relief from the operation of the judgment." (Emphasis added).

In *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), this court permitted a prospective appellant whose opportunity to appeal pursuant to Rule 4(a) had expired to obtain relief under Rule 60(b), by vacating the judgment and entering a new judgment from which timely appeal could be taken. We recognized, however, that this use of Rule 60(b) threatened the integrity of the deadline imposed by Rule 4(a). *Id.* at 459. Accordingly, we held "that Rule 60(b) is available in situations where the excusable neglect does not arise until after the sixty day period" specified in Rule 4(a). *Id.*

Smith's appeal does not meet this last requirement. Judgment was entered on July 18, 1991. Smith's local counsel received notice of the judgment on July 23, 1991. The neglect in failing to file a notice of appeal consequently arose prior to the expiration of the period specified in Rule

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rule requiring designation of local counsel would be of little use to the district court.

4(a) both for appeal and for extension of time to appeal. Smith is therefore precluded from relief under Rule 60(b)(1) by our holding in *Rodgers*.[3]

Smith also appeals the district court's failure to grant relief for "any other reason justifying relief" as contained in Rule 60(b)(6). Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive, however. *See Pioneer Investment*, 113 S. Ct. at 1497. "If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.* Relief under Rule 60(b)(6) requires a party to "show 'extraordinary circumstances,' suggesting that the party is faultless in the delay." *Id.* Such relief "normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Smith consequently cannot qualify for Rule 60(b)(6) relief; his counsel's neglect does not qualify as a circumstance beyond Smith's control.

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[3] It is also most unlikely that the neglect of Smith's attorneys could be found "excusable." Under Rodgers, the fact of actual notice, and the lack of due diligence by lead counsel who failed to inquire for six months, would count against Smith. Rodgers, 722 F.2d at 460. Even under the somewhat relaxed standard of "excusable neglect" applied by the Supreme Court in a bankruptcy context, a finding of excusable neglect was affirmed primarily because of a deficiency in the notice given to counsel. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489, 1498 (1993). Moreover, the attorneys in Pioneer missed the deadline by a mere 20 days, not six months.

CONCLUSION

The district court did not err in denying relief under Fed. R. App. P. 4(a), nor did it abuse its discretion in denying relief pursuant to Fed. R. Civ. P. 60(b). The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK C. SMITH, Jr.,	)	No. C-87-6134-JPV
	)	
Plaintiff	)	ORDER DENYING
	)	PLAINTIFF'S
	)	MOTION TO REOPEN THE
v.	)	TIME FOR FILING A
	)	NOTICE OF APPEAL,
	)	OR ALTERNATIVELY, TO
ANTHONY M. FRANK,	)	VACATE AND REENTER
	)	THE JUDGMENT
	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal, or Alternatively, to Vacate and Reenter the Judgment was scheduled to be heard on February 6, 1992. After a review of the briefs, this court considered it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1, and now DENIES the motion.

PROCEDURAL HISTORY

Plaintiff filed this action pursuant to 29 U.S.C. § 701, *et. seq.* against the U.S. Postal Service for terminating plaintiff from his position as a distribution clerk because of his physical handicap. This Court assigned the action to Magistrate Brennan as a special master under Rule 53,

Federal Rules of Civil Procedure, to conduct the trial, and make recommended findings of fact and conclusions of law. On September 20, 1989, Magistrate Brennan issued proposed findings of fact and conclusions of law, and recommended that judgment be entered in favor of the defendant. Plaintiff then filed fifty nine pages of objections to the Magistrate's findings, conclusions and recommendation. After refusing to consider plaintiff's oversized brief, this Court, on November 29, 1989, adopted Magistrate Brennan's findings of fact and conclusions of law, and dismissed the action with prejudice.

On January 9, 1991, the Ninth Circuit reversed and remanded, directing this Court to permit plaintiff to file his objections in a brief which conformed to the page limitation. Thereafter, plaintiff filed his objections on May 23, 1991. Defendant filed a brief in response to plaintiff's objections on June 20, 1991. Plaintiff filed a reply brief on July 5, 1991. On July 18, 1991 this Court issued an Order adopting the Magistrate's findings of fact and conclusions of law. Pursuant to the Order, final judgment was entered against plaintiff on July 19, 1991.

Pursuant to Rule 77(d), Federal Rules of Civil Procedure, notice of entry of judgment was mailed to one of plaintiff's attorneys of record, "local" counsel James E. Eggleston, and received by Eggleston's office on July 23, 1991. Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, plaintiff was required to file his notice of appeal within 60 days from entry of judgment, i.e. by September 17, 1991. However, plaintiff's other attorney of record, "lead" counsel Susan J. McGolrick, declares that the notice of entry of judgment was not sent to or received by her office, even though all previous court orders had been sent to her office

by the court. Unfortunately for the plaintiff, Eggleston's office filed away the notice without informing McGolrick's office that judgment had been entered, and failed to file a timely notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

McGolrick declares that she did not become aware of the judgment until January 2, 1992, and has thus, filed this motion pursuant to Rule 4(a)(6), Fed.R.App.P., to reopen the time for filing a notice of appeal, or alternatively, to vacate and reenter the judgment pursuant to Rule 60(b), Fed.R.Civ.P.

DISCUSSION

I. Motion to Reopen

Amended Rule 4(a)(6) of the Federal Rules of Appellate Procedure, which became effective on December 1, 1991, provides:

> The district court, if it finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Plaintiff contends that amended Rule 4(a)(6) applies to this case because the so called "lead" counsel McGolrick did not

receive notice of the entry of judgment until January 2, 1992, not within 21 days of its entry, and filed this motion within 180 days of its entry and within 7 days of receipt. Plaintiff argues that, "the Court established a long and consistent practice of dealing directly with plaintiff's "lead" counsel, who performed all of the work in representing plaintiff in this case. Plaintiff's "local" counsel had no substantive involvement in this case and has made no court appearances." Thus, under these particular facts, the Court, by notifying "local" counsel and not "lead" counsel, failed to notify plaintiff of the entry of judgment.

Plaintiff's argument is totally without merit. In the first place, this Court questions whether Amended Rule 4(a)(6) is even applicable to this case. Amended Rule 4(a)(6) became effective on December 1, 1991. In adopting the amendments to the Federal Rules, the Supreme Court provided that "The foregoing amendments . . . shall take effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending." 59 U.S.L.W. 4359. The Supreme Court did not state that the Rules would be applied retroactively to revive those cases, such as this one, in which the time to appeal had already expired. Even under the application of the Supreme Court, the only way this case comports as an "appellate case then pending" is if the amended Rule is applied, thus putting the "cart before the horse."

Even assuming, however, that amended Rule 4(a)(6) applies, reopening the time for appeal is not warranted. The rule specifically provides the district court with the authority to reopen the time for appeal only in those cases where the "party entitled to notice of the entry of a judgment or order

did not receive such notice from the clerk or any party within 21 days of its entry." (emphasis added). According to the Advisory Committee notes:

> The amendment provides a *limited* opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendments adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal *upon a finding that notice of entry of a judgment or order was not received from the clerk* or a party within 21 days of its entry.

Based on the facts of this case, this Court can not make such a finding. It is undisputed that notice of entry of judgment, mailed by the clerk of the court pursuant to Rule 77(d), Fed.R.Civ.P., was *received* by one of plaintiff's counsel of record on July 23, 1991, within 21 days of its entry. "[R]eceipt of notice by one of two counsel of record, as here, sufficiently informs the party of the entry of judgment." *Alaska Limestone Corp. v. Hodel*, 779 F.2d 1409, 1411 (9th Cir. 1986)(citations omitted). This case does not present this Court with one of those "*limited*" situations which amended Rule 4(a)(6) is to apply, i.e. where notice of entry is not received by a party. Amended Rule 4(a)(6) was not meant to relieve "local" and/or "lead" counsel from the obligation of communication. Therefore, relief under Rule 4(a)(6) is inappropriate.

II. Motion to Vacate and Reenter

In the alternative to relief under amended Rule 4(a)(6), Fed.R.App.P., plaintiff has requested that this Court vacate and reenter judgment pursuant to Rule 60(b), Fed.R.Civ.P., which provides:

> the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

In *Rodgers v. Watt*, 772 F.2d 456 (9th Cir. 1983) (en banc), the Ninth Circuit set forth a four factor test for the application of Rule 60(b)(1) to give relief from a judgment in order to reopen the time to appeal: "(1) absence of Rule 77(d) notice; (2) lack of prejudice to the respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to become informed of the date of the decision." *Id.* at 460.

In this case, plaintiff can not meet this test because notice of entry of judgment was mailed to, pursuant to Rule 77(d), and received by one of plaintiff's counsel. Plaintiff's assertion that he did not receive adequate notice of the entry of judgment, "given the Court's previous, long-standing practice of directly notifying plaintiff's "lead counsel" has no merit. Plaintiff can not cite one case which holds that notice to plaintiff's "local" counsel is ineffective or deficient notice to the plaintiff under Rule 77(d). "Local" counsel was counsel of record in this matter, and was properly notified

by the clerk of this Court of entry of judgment pursuant to Ruled 77(d). This constitutes sufficient notice to plaintiff. *See Alaska Limestone Corp.*, 799 F.2d at 1411.

Moreover, even assuming notice of entry of judgment was not mailed to and received by plaintiff's counsel, plaintiff's counsel can not demonstrate due diligence, or reason for lack thereof, in attempting to become informed of the date the judgment was entered. "A party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time." *Alaska Limestone Corp.*, 799 F.2d at 1412 (9th Cir. 1986) (citations omitted). "Lead" counsel for plaintiff can not justify his failure to inquire with the court or opposing counsel of the status of the case for almost six months, from July 5, 1991 to January 2, 1992. In fact, it appears that "lead" counsel only became aware of the judgment in this case when opposing counsel called her on a related matter. Had that conversation never taken place, "lead" counsel might not have known of the judgment to this day. Such inaction does not constitute due diligence, and therefore, relief under Rule 60(b)(1) is inappropriate.

Relief under Rule 60(b)(6) is also inappropriate. Rule 60(b)(6) has generally been held to apply only to those "extraordinary circumstances" which are outside the scope of Rule 60(b)(1) - (5). *See generally Klapprott v. United States*, 69 S.Ct. 384 (1949); *Ackerman v. United States*, 71 S.Ct. 709 (1950). In this case, plaintiff's "reliance on the district court to send the notice of judgment to one counsel rather than the other does not . . . constitute a unique circumstance . . ." *Alaska Limestone Corp.*, 799 F.2d at 1412. Rather, this case falls under those situations which

happens far too often, inexcusable neglect by counsel. "Local" counsel's failure to properly handle the notice of entry of judgment, and "lead" counsel's failure to check on the status of the case, do not justify relief under Rule 60(b)(6).

ORDER

In accordance with the foregoing discussion, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal, pursuant to amended Rule 4(a)(6), Federal Rules Appellate Procedure is DENIED.

2. Plaintiff's Alternative Motion to Vacate and Reenter Judgment, pursuant to Rule 60(b)(1) or (6), Federal Rules of Civil Procedure, is DENIED.

DATED: April 22, 1992

J.P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF COLUMBIA

JACK C. SMITH,

Plaintiff,

v.

ANTHONY M. FRANK,

Defendant.
_____/

NO: C-87-6134 JPV (JSB)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Plaintiff Jack C. Smith ("Smith") alleges that defendant Anthony M. Frank, Postmaster General of the United States Postal Service ("Postal Service") improperly terminated Smith's employment with the Postal Service in violation of Section 501 of the Rehabilitation Act of 1973 which prohibits federal agencies from discriminating against employees or applicants for employment on the basis of disability. In particular, Smith alleges that the Postal Service terminated him because of his back ailments in spite of the fact that he was able to perform the essential functions of a distribution clerk without endangering himself or his coworkers.

Judge Vukasin referred the matter to this Court for an evidentiary hearing and findings of fact, conclusions of law and recommendations. An evidentiary hearing was commenced on June 26, 1989. David L. Rose, Esquire and Laraine L. Laudati, Esquire appeared on behalf of plaintiff; JoAnn M. Swanson, Assistant United States Attorney and Beth McGarry, Special Assistant United States Attorney

appeared on behalf of defendant. After three days of testimony the matter was continued until August 14, 1989 in order that the parties could complete further discovery. Following three and one-half additional days of testimony concluding on August 17, 1989 the matter was submitted.

An evidentiary hearing having been held and the matter having been duly considered the Court makes the following findings of fact, conclusions of law, and recommendations:

I. FINDINGS OF FACT

1. In January 1968 defendant hired Smith to be a distribution clerk in the Concord, California Post Office.

2. Prior to 1976, Smith worked the "swing tour" from 3:00 p.m. until 11:00 p.m. Initially, Smith's duties during this period included loading and unloading trucks and loading and unloading parcels and sacks. During this period his duties as a distribution clerk also included sorting and distributing mail at his "case." A case is a counter with an upright grid of pigeonholes for different carrier routes within specific zipcodes. Each case corresponds to a particular "scheme." There are several schemes at the Concord Post Office. A scheme consists of 100 items or more which reflect the routes and corresponding addresses within each zipcode. As he gained seniority and scheme knowledge Smith did less loading of trucks and less heavy lifting.

3. During he period from 1976 until 1982, Smith worked the "midnight tour" from midnight until 7:30 a.m.

4. During the course of his employment Smith has undergone five back surgeries. These operations occurred

in January 1973, October 1980, July 1982, September 1982 and June 1984.

5. On January 2, 1973 Smith was admitted to Mt. Diablo Hospital with a diagnosis of degenerative disc disease of the lumbar spine with possible herniated disc. On January 11, 1973 plaintiff underwent his first back surgery: a laminectomy and discectomy at L3-L4 and L4-L5 on the right side.

6. In October 1980 Dr. Clyde O'Neill performed a lumbar laminectomy at L4-L5 on the left side.

7. On July 7, 1982 Dr. O'Neill performed a left lumbar exploration and discectomy at L3-L4.

8. On September 15, 1982 Dr. O'Neill performed laminectomies at L3-L4, L4-L5, and L5-S1 on the left side and a repeat discectomy at L4-L5.

9. On June 12, 1984 Dr. Charles W. Barnes, assisted by Dr. O'Neill, performed a posterior lumbar interbody fusion at L3-L4, L4-5 and L5-S1.

10. Following each operation Smith was on sick leave or leave without pay for approximately three months.

11. As a result of his back ailments, Smith also suffers a "dropped foot" which means he cannot pick up his left foot. This ailment produces a shuffling walk or slap gait. Smith's "dropped foot" results from impingement of the nerve root at L5 (probably from post-operative scarring) and has been noticeable since 1982. Transcript of Dr. Lin Ho, M.D. Trial Transcript, at 95, line 7 to 97, line 2.

12. Following his last surgery in 1984 Smith returned to work on temporary light duty status. Article 13 of the national collective bargaining agreement between the Postal Service and the American Postal Workers Union and the National Association of Letter Carriers provides that an employee recuperating from a serious illness or injury and unable to perform all his assigned duties is eligible for temporary light duty.

13. Following the June 1984 fusion surgery Smith's treating physician, Dr. Barnes, imposed several limitations on Smith. "[T]he patient can stand, sit 6-8 hours a day though with several breaks, more for changing position. He should avoid heavier lifting, keeping lifting to 10-15 pounds, and that not on a frequent basis. Repetitive bending as well as twisting should be avoided." Plaintiff's Exhibit 27.

14. In September 1984, defendant ordered Smith to submit to a fitness for duty examination to be conducted by Dr. Willie L. Wilson, Postal Medical Officer. Following the examination, Dr. Wilson reported to Postmaster Helm that, "Mr.Smith has medical clearance to return to light duty, 9-12-84." Dr. Wilson imposed the following limitations on Smith:

(1) can work up to 8 hr/day
(2) should have the freedom to sit & stand at will
(3) Limited stooping
(4) *No* bending
(5) can lift up to 10 *lbs.*

Plaintiff's Exhibit 35, Memo dated 9/5/84 from Willie Wilson, M.D. to Postmaster, Concord. Accordingly, on September 6, 1984, Postmaster Helm wrote to Smith

informing him that his request for light duty was granted, he could return to work with the restrictions imposed by Dr. Wilson and he would be re-evaluated in four months. Plaintiff's Exhibit 19.

15. In 1985, distribution clerks at the Concord Post Office worked in three different areas -- unloading mail trucks, breaking down or "staging" mail, and distributing mail to specific carrier routes.

16. Unloading the trucks entails pushing or pulling mail containers off the truck and onto the loading dock and into the staging areas. The mail arrives in aluminum containers, hampers, or wooden pallets. The containers, which weigh 475 pounds when empty, are loaded with mail sacks (weighing up to 70 pounds), tubs of flats (weighing up to 50 pounds), trays of letters (weighing up to 20 pounds), or parcels.

17. In the staging areas the clerks unload the incoming mail containers and hampers and organize the mail on platform trucks by zipcode. This requires bending or reaching to lift a tray, tub, or bundle out of the container and to place it on a platform truck. The clerks also lift parcels out of the large containers and place them in hampers or utility carts designated by zipcodes. Then the clerks push the platform trucks or utility carts to the distribution area. Platform trucks have a gross capacity of about 1500 pounds. Utility carts weigh approximately 250 pounds when full.

18. In 1985 distribution of letters required that the clerk bend to lift a tray from a sideless flat metal cart, known as a nutting truck, and then dump the mail from the tray onto the ledge of the letter sorting case. While standing erect or

leaning on a rest bar the clerk then sorts the mail into the pigeonholes of the case.

Once the cases are full, all the clerks working a particular scheme simultaneously perform a "pull down." A "pull down" consists of taking an empty tray and, walking in front of the row of cases, pulling down all of the letters in each case which belong to a specific carrier route. After pulling down all the letters for a specific route from all the cases, the clerk places the tray on a tray cart ("pie rack"). A fully loaded "pie rack" holds between 24 and 35 trays and weighs between 730 and 970 pounds. The clerk pushes the "pie rack" to the carrier section of the post office and dumps two trays onto the carrier's ledge and stacks the remaining trays on top of the dumped letters.

19. Distribution of flats, flat pieces of mail wider than letters such as manilla envelopes, entails lifting tubs of flats weighing up to fifty pounds off the nutting truck and onto the ledge of the sorting case. Flat sorting cases are larger than letter sorting cases and thus require more movement on the part of the distribution clerk. When "pulling down" flats, the clerk places the flats on a nutting truck, which contains a wooden device to layer the mail by route, and pushes the truck to the carrier area. Then the clerk must bend and lift the flats off the truck and place them in a wooden case in the carrier's section.

20. Distribution of parcels entails removing the parcels from the large containers and placing them in hampers by zipcode. Fully loaded, the hampers can weigh up to 500 pounds. Distribution clerks push these hampers to the carrier area where they bend and lift the parcels out of the

hampers and place them into specific carrier route hampers. Parcels may weigh up to 70 pounds.

21. Of the above-described duties of a distribution clerk, scheme knowledge was not required for unloading trucks, breaking down mail, placing mail on case ledges, pull downs, and moving mail after pull downs to the carrier areas. The supervisors preferred to keep more senior clerks sorting mail at the cases as opposed to performing duties not requiring scheme knowledge.

22. While on light duty status Smith would sort local bulk mail when he first arrived at the post office. These bulk mailers would include bundles of about fifty letters apiece rubber-banded together. Such bundles would weigh about one pound. Smith would sort these bundles from a tub at the end of the case. Smith would normally sort at the first case in the line and the tub would not be in anyone's way. At this time of the shift the other clerks would generally be sorting bulk flats or bulk business mail flats or they would be staging the breakdown area for in-coming mail. Smith could not perform these duties because of his weight limitations and the stooping and bending restrictions.

23. After sorting the local bulk mail Smith would sort first class mail. The supervisor or another distribution clerk would provide Smith with a tray of mail since his weight limitations prohibited lifting the trays.

While on light duty Smith did not sort flats or parcels. Sorting flats would require lifting more than ten pounds and a significant amount of turning and twisting at the flat case. Many parcels weigh more than ten pounds and sorting parcels required lifting, carrying, and throwing parcels.

Generally, in 1985 distribution clerks would on an average be asked to distribute parcels once in ninety days for a maximum of four hours.

24. While on light duty Smith did not participate in pull downs. Pull downs required lifting and carrying fifteen to twenty pound loaded trays. During pull downs Smith would move to another scheme which was not being pulled down and sort letters there. If the other schemes were also being pulled down, Smith would take a break or remain idle during the pull downs.

25. In 1985, it would be unlikely that a distribution clerk with Smith's seniority would be called upon to load or unload trucks, distribute parcels, or break down mail. Furthermore, about half the crew preferred to sort first class flats and a small group of distribution clerks did so on a regular basis.

26. The Postal Service's *Key Positions Descriptions* describes the duties and responsibilities of a distribution clerk as follows:

> (A) Makes primary and one or more secondary distributions of incoming mail by delivery point . . . based on a knowledge of the distribution scheme established for that office.
>
> (B) Makes primary and one or more secondary distribution of outgoing mail for dispatch . . based on a knowledge of the distribution scheme prescribed by the Postal Transportation Service.

(C) In addition, may perform any of the following duties:

(i) Maintains records of mails.
(ii) Examines balances in advance deposit accounts.
(iii) Faces and cancels mail.
(iv) Ties mail and inserts facing slips.
(v) Opens and dumps pouches and sacks.
(vi) Operates cancelling machines.
(vii) Records and bills mail . . . requiring special service.
(viii) Renders service at public windows.

Plaintiff's Exhibit 1.

27. Kathryn MacRae, a supervisor of mails for the postal service, considered Smith above average in proficiency in the number of letters that he could distribute in his letter case and ranked him in the top third of all distribution clerks. Fred Blackburn, another post office supervisor, considered Smith an average clerk. Jack L. Watkins, President of the American Postal Workers Union Local in Concord, considered Smith to be of above average proficiency in mail distribution. Smith's co-workers did not complain that he was on light duty.

28. MacRae observed Smith to have problems with mobility and to be suffering from a great deal of pain. He shuffled as he moved and "[e]verything was done very deliberately, as if to avoid pain." Trial Transcript at 359, line 25. On one occasion Smith left early complaining that he "'couldn't stand the pain anymore.'" Id. at 360, line 8.

Blackburn made similar observations,

> This time [as compared to his recovery from previous surgeries] he was having problems walking ... he'd walk more of a shuffle than he did on a walk. He walked -- he moved a lot slower than what he had in the past. Very cautiously.
>
> He wasn't vocal any more....
>
> * * *
>
> But it just wasn't the same Jack as what we had before, in the sense that it looked like he was laboring. It was a strain to get through the eight hours more than what is [sic] was in the past.
>
> * * *
>
> [I]t became a concern whether or not we were really helping Jack by allowing him to work without hurting himself.

Id. at 195, line 17 to 196, line 14.

29. In February 1985, defendant ordered Smith to submit to a second Fitness-for-Duty examination. At this examination Smith reported to Dr. Wilson that Smith's condition had not improved and that he had missed some days of work because of the pain. He could not sit for more than thirty minutes. He still had a foot drop and was having

problems standing on the cement floor for eight hours per day, five days per week.

Dr. Wilson concluded:

> It is my medical opinion that Mr. Smith *is not fit for duty* for the position of full-time distribution clerk. This decision is based upon his complaints of lower back pain/discomfort that has affected both legs but especially the left....The functional/environmental requirements of heavy lifting/carrying/pushing or pulling, prolonged standing/walking, and/or prolonged sitting as sitting on a restbar or even in a chair with a straight back, frequent or repetitive bending/stooping, and/or protracted hours of work *can endanger his health and safety.* Limitations are unchanged from those of September 1984 - ie, (1) can work up to eight hours per day, (2) Should have the freedom to sit and stand at will, (3) limited stooping; no bending, (4) can lift up to ten pounds; no carrying/pushing or pulling over ten pounds. (Emphasis in original.)

Defendant's Exhibit G, at 28, Fitness for Duty Determination. Dr. Wilson was concerned that if Smith returned to regular work his degenerative back condition would deteriorate more rapidly. Trial Transcript, at 245, lines 3-5.

30. William A. Helm is the Postmaster for Concord and Pleasant Hill, California. He has held that position since May of 1983.

31. After receiving Dr. Wilson's Fitness for Duty Determination, Postmaster Helm met with his managers Bob Blackburn and Gene Porta to discuss the report. Postmaster Helm then requested supplemental information from Smith's treating physician, Dr. Barnes. In a letter to Smith dated April 26, 1985 Helm asked Smith to have Dr. Barnes address the following points:

1. Ability to lift 75 lbs.
2. Constant standing, stooping, reaching, bending.
3. Ability to work up to 11 hours per day and 6 days per week with the requirements in #1 and #2.

Defendant's Exhibit J-3, at 19. In response, Dr. Barnes remarked, "[s]hould *not* for another 6 months if all goes *well*! Remain light duty!!" (Emphasis in original.) Id.

32. On the basis of the requirements of a distribution clerk position, Smith's medical restrictions, absence record, and employment history, and the then current mail conditions at the Concord office, Postmaster Helm terminated Smith's light duty authorization.

33. Helm considered reassigning Smith to other craft positions at the Concord Post Office. Only positions as letter carrier and custodian were available. Helm determined that reassignment to either position would be an inappropriate action since the jobs required physical activity

beyond Smith's medical restrictions. For instance, a letter carrier does all the same work a distribution clerk does and transports the mail to a vehicle and then delivers the mail by vehicle or foot. Likewise, a custodial position also requires intense physical activity such as carrying buckets of water, climbing ladders and working overhead.

34. Helm did not consider reassigning Smith to any other post office positions because such positions were bid jobs, subject to the terms of the collective bargaining agreement.

35. On May 22, 1985 Helm wrote to Smith informing him that his light duty status would terminate on June 7, 1985. Defendant's Exhibit G, at 34.

36. On June 11, 1985 Supervisor Fred Blackburn wrote to Smith informing him that he would be separated form the Postal Service. Blackburn explained, "[w]e are unable to continue to provide work for you under the limitations set by your doctor. Furthermore, we are very concerned that you could further aggravate your back condition and endanger yourself or other employees by placing you in a work status." Defendant's Exhibit G, at 35.

37. Since his termination from the post office, Smith has suffered several traumatic incidents.

38. In 1986 and 1987 Smith was employed by the Martinez Cab Company as a driver and later as a dispatcher. During the course of this employment Smith was the victim of two physical assaults. During the first year of his employment at the cab company Smith was assaulted by the boy friend of a rape victim whom Smith was escorting home

from the hospital. Smith reported that he strained his back trying to avoid the assault and the resulting pain lasted perhaps a week, but not longer than a month. On August 5, 1987 Smith was the victim of an armed robbery while working as a dispatcher. One of the two robbers put a gun to Smith's head and asked him for the money. After telling his assailants that the money, if any, would be in a file cabinet, they took him to the back of the building where they tied and gagged him, slashed him in the face with a knife, and threatened to harm him further if they did not recover any money.

39. Following the robbery Smith sought treatment from a psychiatrist, James S. Gracer, M.D. Dr. Gracer treated Smith for post-traumatic stress disorder.

40. On January 1, 1988, while riding a bicycle, Smith was hit from the rear by a car, suffering a compression fracture at L2. Defendant's Exhibit J-1, at 46. Prior to the bicycle accident Smith was riding his bicycle fifty miles a day.

41. On July 2, 1988 Smith was involved in an automobile accident in which he was rear-ended. Smith did not experience any immediate pain but that night began feeling pain in his neck, low back, and right shoulder. Smith underwent an arthrogram in September, 1988 and a diagnosis of a rotator cuff tear in his right shoulder was made. As a result of the arthrogram procedure, Smith developed an infection in his shoulder. On May 22, 1989 Dr. Norris operated on Smith's right shoulder. The surgery disclosed no rotator cuff tear. Rather, Dr. Norris only found torn muscles which he reattached. Smith was still wearing a sling at the time the evidentiary hearing

commenced on June 26, 1989. Dr. Lin Ho, M.D. testified on August 14, 1989 that it was still too early to say whether or not Smith's shoulder surgery was successful and that it takes six months generally to know how successful such surgery is. Trial Transcript, at 157, lines 7-10.

42. On March 19, 1986, less than one year after his termination and prior to any of the traumatic incidents described in ¶'s 38, 40, and 41, supra., Smith began weekly visits to the Veteran's Administration Out Patient Clinic for the treatment of chronic intractable pain. These visits continued on a weekly basis through January of 1988. Smith visited the clinic again twice in May of 1988. All together Smith had over fifty appointments with Dr. George Shardlow of the V.A. pain clinic. During these visits Smith frequently complained of pain, numbness, and muscle spasms. Smith did not disclose to defendants that he was receiving treatment for chronic pain from Dr. Shardlow until defendants discovered a reference to such treatment in the records of Dr. Becker which were finally produced pursuant to court order after the commencement of trial.

43. Dr. Robert B. Cahan is a psychiatrist who examined Smith at the request of the defendant. Dr. Cahan interviewed Smith, reviewed his medical and related records, and had Dr. Fred Rosenthal conduct a series of psychological tests on Smith. Based upon the interview, review of records, and tests, Dr. Cahan diagnosed Smith to be suffering from, inter alia, an intermittent explosive disorder. In making this diagnosis Dr. Cahan relied on evidence of impulsive and explosive behavior since childhood including running away at ages eleven and thirteen, drawing his rifle on a drill instructor while in the military, throwing his wife across the room, assaulting

several Oakland police officers, assaulting a V.A. psychiatrist, slugging a drunken customer at the cab company, holding a gun to his own head and contemplating suicide, attempting suicide by taking a large dosage of valium, and berating a neighbor who swore at Smith's son and threatened his dog. Cahan Trial Testimony at 391-394.

Cahan also diagnosed post traumatic stress syndrome relating to the robbery incident at the Martinez Cab Company. This diagnosis was based upon psychosomatic conditions including tension headaches, muscle spasms, and diarrhea.

Dr. Cahan concluded:

> Well, some physicians have been of the opinion that he is not capable of doing the amount and duration of exertion that he would have to do [to perform the duties of a distribution clerk.] And so there is a danger to himself and his health because of a pattern of not cooperating with the physician.
>
> He tends to suppress or hides symptoms which must make it very difficult for the physician to be not only correct but secure in his diagnosis and recommendations. He fails to follow the restrictions in activity. He fails to take his medication.
>
> And all this, because inside it's so important for him to continue to be healthy and strong and capable. And to have that

> image. And to feel that way. So much so that he denies anything that differs with that idealized image of himself.

Id., at 409 line 18 to 410 line 7.

44. In a May 3, 1989 report to Dr. Norris, Dr. Becker noted that,

> The patient told Dr. Gracer considerably more details about his past psychiatric history than the patient would acknowledge when he saw me.

Defendant's Exhibit O, at 7.

45. Smith told his treating psychiatrist, Dr. James Gracer, that if Smith lost this lawsuit he would physically harm four named Postal Service employees.

Following the robbery incident, Smith kept loaded guns in his house, had a fear of leaving the house, and at times carried a gun with him when he left the house. Dr. Gracer believes that Smith no longer carries a gun.

46. Dr. Gracer described Smith's view of himself as a macho, prove-himself-physically type of guy. Trial Transcript, at 534 lines 7-11. Smith informed Dr. Gracer that Smith disregarded his doctor's instructions about wearing a sling. Id. at lines 12-17.

II. CONCLUSIONS OF LAW

1. Jurisdiction in this Court exists under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 794a(a)(1).

2. A prima facie case of handicap discrimination consists of evidence that (1) the plaintiff is handicapped within the meaning of the Act; (2) the plaintiff is a "qualified handicapped person;" and (3) the plaintiff was terminated because of his handicap. *Manolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

3. The statute defines a handicapped person as one who, "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. 706(8)(B)(i). It is undisputed that plaintiff is handicapped within the meaning of the Rehabilitation Act.

4. A "'qualified handicapped person' means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. 1613.702(f). Thus, a handicapped employee need not be able to perform all the functions of the job in order to be considered "qualified."

5. The Court finds that Smith was able to perform the essential functions of the distribution clerk position. The description of the position (see ¶ 26, supra) demonstrates that the primary responsibility of the job of distribution clerk is to sort mail per scheme knowledge. Moreover, the testimony of Watkins, Blackburn, MacRae, and Smith

establishes that a distribution clerk with Smith's seniority only occasionally performed the other duties of a distribution clerk such as unloading trucks, distributing parcels, or breaking down mail. Furthermore, Smith was considered to be at least an average clerk so far as his proficiency in sorting mail.

Admittedly, Smith was unable to perform the function of pull downs, a function performed by distribution clerks with Smith's seniority. However, because Smith had knowledge of more than one scheme, he could be assigned to sort mail at another work station and was rarely idle during pull downs. To have Smith sort mail at another scheme when a pull down occurred at the scheme where he had been working made reasonable accommodation for his physical handicap.

6. The regulations require that a federal agency make "reasonable accommodation" to a handicapped employee. 29 C.F.R. 1613.703(a). See also *School Board of Nassau County v. Arline*, 480 U.S. --, 107 S.Ct. 1123, 1131 n. 17. Furthermore, "[r]easonable accommodation may include, but shall not be limited to: * * * (2) job restructuring, part-time or modified work schedules, acquisition or modification or equipment or devices, * * * and other similar actions." 29 C.F.R. 1613.704(b).

7. The Employer need not provide any accommodation that would be an undue hardship. An "undue hardship" has been interpreted to mean "undue financial and administrative burdens," or to require "a fundamental alteration in the nature of the program." *School Board of Nassau County*, at 1131. The government has failed to show that continuing Smith's light duty status created an undue hardship.

Assigning Smith work that was within his limitations did not require excessive planning on the part of the supervisors, Smith was a productive worker, was rarely idle, and his light duty status did not unduly impact the work of the other clerks.

In other circumstances it has been found that employment of a distribution clerk with limitations did create an undue hardship. For instance, in *Dexler v. Tisch*, 660 F.Supp. 1418, 1428 (D. Conn. 1987) the court held,

> [O]ne possible accommodation for Mr. Dexler is to not assign him to do various tasks normally assigned to distribution clerks. However, because of the type of operation, such an accommodation would often leave Mr. Dexler without work to do, which would be an undue hardship.

In contrast to the situation in *Dexler*, the operation at the Concord Post Office did not leave Smith without work to do during activities from which he was precluded by his physical limitations.

8. Nonetheless, while Smith was able to perform the essential functions of the distribution clerk position without placing an undue hardship on the post office, he could not perform his duties without risking his own or others' safety. As established above, Smith failed to be completely candid regarding the extent of his back pain with his medical providers. Despite Smith's attempts to conceal his real situation, his supervisors at the post office observed him to be in considerable pain during his eight-hour work shifts.

Smith is an individual for whom physical performance is very important - he appears to have a continuous need to prove himself through physical achievements. In light of Smith's compulsion to engage in physically demanding activities, his under-reporting of pain to his surgeons and medical examiners, and his supervisor's observations of the strain and pain suffered by Smith to perform his job even on light duty, the postmaster's finding that Smith's continued light duty status was a risk to Smith's own health and safety was correct. Accordingly, Helm's decision to terminate Smith on this basis was proper and did not constitute a violation of the Rehabilitation Act. 29 U.S.C. 701.

9. Furthermore, the government is not required to reassign Smith in violation of collective bargaining agreements. *TWA v. Hardison*, 432 U.S. 63, 79-81 (1977). Thus, Postmaster Helm did not violate Smith's rights under the Rehabilitation Act when he did not reassign Smith to a bid position for which Smith was qualified and which he could perform without risking harm to himself or others.

10. Because plaintiff has not prevailed, it is not necessary for this Court to consider issues related to relief such as reinstatement or back pay.

11. Any finding of fact or conclusion of law stated herein which may be considered to be the other is deemed to be such, to the extent appropriate.

III. RECOMMENDATIONS

In consideration of the above findings of facts and conclusions of law this Court hereby recommends to the District Court that judgment be entered on behalf of defendant.

Dated: September 12, 1989

JOAN S. BRENNAN
United States Magistrate